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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-382

FEDERAL ENERGY ADMINISTRATION, ET AL.,
PETITIONERS,

v.

ALGONQUIN SNG, INC., ET AL.,
RESPONDENTS.

REPLY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD B. DONDIS
RICH, MAY & BILODEAU
One State Street
Boston, Massachusetts 02109
(617) 742-6550
WILLIAM R. CONNOLE
CONNOLE & O'CONNELL
One Farragut Square
Washington, D.C. 20006
(202) 347-8300

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Algonquin SNG, Inc., et al. oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above case. In accordance with Rule 40(3) as incorporated in Rule 24(1) of the Rules of the Supreme Court of the United States, Respondents do not include herein the items preliminary to argument covered in pages 1 through 11 of the Petition, except where Respondents are dissatisfied with the presentation.

Question Presented

Whether the President is authorized under Section 232(b) of the Trade Expansion Act of 1962 as amended (19 U.S.C. § 1862(b)) to impose a system of import license fees which has the effect of a tariff.

Reasons for Denying Review on Writ of Certiorari

I. CONTRARY TO THE ASSERTION OF PETITIONERS, THERE IS NO "QUESTION OF FUNDAMENTAL AND URGENT IMPORTANCE TO THE ECONOMIC WELL-BEING OF THE NATION . . . [WHICH] SHOULD BE RESOLVED BY THIS COURT." (PETITION, P. 11)

Respondents hereby specifically adopt the argument submitted by counsel for the Commonwealth of Massachusetts et al. on this issue (Reply Brief of Commonwealth of Massachusetts et al., Reasons for Denying Writ, No. I). Respondents regard the substantial withdrawal of the President's oil import license fee program as a major reason for denying certiorari. There are, moreover, other significant reasons why certiorari should be denied.

The Respondents agree that reduction of this country's dependence upon foreign oil is a very serious matter which should be given high priority by the executive and legislative branches. However, the decision of the Circuit Court does not impair the President's ability to deal with this problem. That decision deprives the President only of the asserted power to impose *indirect* methods of import controls, i.e. tariffs and fees. Accordingly, the President is deprived only of one among many methods of dealing with the foreign oil problem. The Court below was careful to point out that the President is not restrained by that Court's decision from restricting imports through the imposition of

direct import controls such as quotas. In the words of Judge Tamm for the Court below:

> "We also realize that the judicial branch was accused of straightjacketing the coordinate branches of Government in their attempt to alleviate the massive economic dislocation created by another grave crisis, the Great Depression. We do not believe that any such criticism would be justifiable here. The President could have moved against this problem on a unilateral basis through direct controls. Alternatively, he could have sought, as he has, additional measures from Congress." (Petition, App. A, p. 28a)

Petitioners in effect identify as a matter of fundamental and urgent national importance, the satisfaction of the President's wishes to employ license fees rather than quotas as a method of controlling the importation of foreign oil. While the President may not be pleased to employ quotas as a method of import control because of bureaucratic or political convenience,[1] it is nonetheless true that a system of oil import quotas will effectively reduce the volume of foreign oil.[2]

The President's objective has been to reduce domestic demand for petroleum indirectly through increased prices for domestic and foreign oil, either by import license fees

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[1] The Affidavit of Eric R. Zausner, Deputy Administrator of the Federal Energy Administration, presented to the Court below on August 15, 1975, states that the President rejected the quota system and chose the fee system as "the most effective, least disruptive and publicly acceptable mechanism," a mechanism avoiding "the necessity for a vast bureaucracy." (Zausner Affidavit of Aug. 15, pp. 4-5)

[2] The question of quotas versus tariffs as a mechanism of import control is a complex one, not appropriate for grand generalizations such as the statement of Petitioners that quotas "have proved to be unsuitable and could cause artificial shortages and dislocation . . . ." (Petition, p. 11) *See*, "World Oil Developments and U.S. Oil Import Policies," A Report Prepared for the Committee

or price decontrol of domestic oil.[3] The expressed objective of the Congress, while less well-defined, is in large part contrary to the President's, as indicated by the recent bill to extend the Emergency Petroleum Allocation Act (S. 1849), and the adoption of the license fee moratorium bill (H.R. 1767), both passed by substantial majorities in Congress and vetoed by the President.

The fact is that the President and Congress are engaged in a debate over the implementation of U.S. energy policy. Implicit in Petitioners' argument is the claim that it is of fundamental and urgent national importance that the President's choice of action to deal with the oil crisis prevail over the congressional choice of action. Respondents respectfully submit that acceptance of this contention would lead this Court into making a political decision on energy policy of the sort currently being debated between Congress and the President.[4]

Furthermore, the Petitioners' assertion that the import license fee system is essential to the economic well-being of the nation is belied by their actions. The President, with characteristic candor, has acknowledged that the supplemental license fees were adopted in an effort to goad the Congress into action on energy legislation.[5] In addition, the Federal Energy Administration on September 22, 1975

on Finance by the U.S. Tariff Commission. T. C. Publication 632, at 110-146.

[3] Zausner Affidavit of August 15, 1975, pp. 3-4.

[4] It should be noted that th issue of whether this case posed a "political question" was thoroughly briefed before the District Court below. The government at that time conceded, and Judge Pratt found, that the controversy was not one "which the doctrine of separation of powers as well as prudence and good sense would cause us to avoid." (Petition, App. C, p. 39a)

[5] *See*, Presidential Remarks and Messages to House of Representatives, March 4, 1975, Weekly Compilation of Presidential Documents, Vol. II, No. 10, pp. 238-240; President's Letter to the Speaker of the House and the President of the Senate, April 30, 1975, Weekly Compilation of Presidential Documents, Vol. II, No. 18, pp. 467-8.

announced the permanent suspension of the supplemental license fees on petroleum products, effective September 1, 1975 (40 F.R. 44306, September 26, 1975). Surely a program vital to the national security and economic well-being of the nation would not be abandoned by the FEA.

Respondents respectfully submit that the judicial issue in this case is whether Congress ever authorized the Presidential oil import fee system, not whether it is urgent to the economic well-being of the nation that the President prevail in his preferred course of action in meeting the current crisis.

II. Petitioners Have Not Given Reason for This Court to Review the Careful Analysis by the Court of Appeals of the Legislative History of Section 1862(b) and the Decision of That Court That the Statute Does Not Authorize the Presidentially Imposed Oil Import Fees.

The Court of Appeals examined Section 1862(b) in the light shed by its general statutory context and "generalize[d] from . . . [its] examination of the myriad of trade provisions that congressional delegations have been narrow and explicit in order to effectuate well-defined goals." (Petition, App. A, p. 13a) The Court concluded, "Fitted against this scheme, the Government interpretation of Section 1862(b) would represent an anomalous delegation of almost unbridled discretion and authority in the tariff area." (Petition, App. A, p. 14a)

Petitioners reply only (Petition, pp. 16-17, § 3) that 19 U.S.C. 1981(a), the so-called "escape clause," conferred "analogous authority" on the President.[6] Petitioners do

[6] The "escape clause" was substantially revised and reenacted in Sections 201-203 of the Trade Act of 1974, P.L. 93-618, 88 Stat. 2011-2018.

not mention that the Court below specifically cited this clause (Petition, App. A, p. 13a) as representing one of the many provisions delegating tariff power in a narrow and explicit manner to the President, from which the Government interpretation of Section 1862(b) is "an anomalous departure." (Petition, App. A, p. 12a) As Petitioners and the Court below note, Section 1981(a), unlike Section 1862(b), delegated to the President a tariff adjustment power *in express terms*. Moreover, Petitioners neglect to call attention to the multiple ways in which the Section 1981(a) delegation of the tariff power was hedged about with specified congressional checks and limitations.[7]

The Court of Appeals considered the full range of legislative sources for the initial enactment of Section 1862(b), citing the Report of the Senate Committee in which the provision originated,[8] the Report of the Conference Committee,[9] and statements of various congressmen in the floor debate. The Court decided that "[i]n light of all factors . . . the single floor statement the Government may justifiably rely upon is a woefully slender reed to support its construction of the statute." (Petition, App. A, p. 19a) In rebuttal, Petitioners attempt only the semantic corruption of a statement by Senator Byrd to support their argument. (Petition, p. 13, n. 10) [10]

[7] Section 1981(a) could be invoked only by the narrow circumstances of a Tariff Commission finding of imports threatening a domestic industry "as a result in major part of concessions granted under trade agreements." (19 U.S.C. 1901(b)) The response of the President to said Tariff Commission finding under Section 1981(a) was subject to immediate congressional review and potential reversal. (1981(a)(2)) Most importantly, the President's tariff adjustment power under Section 1981(a) was limited to an increase of not more than 50% above the 1934 rate. (1981(b)) In comparison to the present case, the limit of 50% above the 1934 base rates was exceeded by even the "first tier" of oil import fees imposed by President Nixon.

The revisions made in the "escape clause" by the Trade Act of 1974 (idem.) circumscribe Presidential action thereunder with additional congressional controls.

[8] S. Rep. No. 232, 84th Cong., 1st Sess. (1955).

[9] Conf. Rep. No. 745, 84th Cong., 1st Sess. (1955).

The Court of Appeals examined the reenactments of Section 1862(b) and found particularly probative the congressional rejection of a proposed Section 353 to the Trade Expansion Act of 1962, which would have expressly given the President the tariff adjustment power now claimed under Section 1862(b) (108 Cong. Rec. 19875 (1962)). The Court concluded that the rejection of proposed Section 353 justified the double inference that Congress believed no other provision delegated such a tariff adjustment power and that Congress did not desire so to delegate its power. (Petition, App. A, pp. 19a et seq.)

Petitioners concede that the rejected Section 353 "would indeed have been an expansive delegation of authority to the President" (Petition, 15) but contend that Section 1862(b) is in comparison a narrow and limited delegation. Since Petitioners claim that Section 1862(b) like proposed Section 353 contains a Presidential tariff power, the distinction upon which they rely is that Section 1862(b) requires the finding of a threat to the "national security", whereas Section 353 would have required the finding of a threat to the "national interest." This distinction is captious when considered in light of (a) the infinite factors listed in Section 1862(c) as bearing upon the national security and (b) the fact, as the Court below noted, that

[10] The statement in question by Senator Byrd, made in response to a question by Senator Saltonstall which employed a similar grammatical construction, clearly represents a use of the word "or" synonymously with "namely" or "i.e." to explain the preceding expression:

> Mr. Saltonstall: This gives the opportunity to the President to adjust imports, *under restrictive conditions or quotas* . . . .
>
> Mr. Byrd: It simply leaves to the President the power, in his discretion, to *decide whether to impose a quota or to reduce the imports.*

(101 Cong. Rec. 5297 (1955); emphasis supplied).

Section 1862(b) applies to all commodities. (Petition, App. A, p. 14a)

Petitioners raise certain points with respect to the legislative history of Section 1862(b) for the first time in the Petition to this Court for writ of certiorari. In view of the heavy reliance upon these points in the Petition, it is anomalous that Petitioners did not see fit to present them to the courts below. Respondents respectfully submit that it is inappropriate to seek to impose such arguments upon this Court by way of review without the benefit of analysis by the Court of Appeals. A petition for rehearing was available if Petitioners claim points of law have been overlooked which are of crucial importance to the issues decided by the Court below.[11] The points raised for the first time by the Petition are discussed below.

First, Petitioners cite a report in 1958 of the Office of Defense Mobilization to a subcommittee of the House Ways and Means Committee [12] as authority for the intent of Congress in reenacting Section 1862(b) in that year. (Petition, pp. 13-15) Plainly, a statement made three years later is poor authority for the intent of Congress in 1955. As this Court said as recently as the last term, "subsequent legislative history" is not probative of legislative intent.

> "[P]ost-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage." *Blanchette* v. *Connecticut General Insurance Corporations*, 419 U.S. 102, 42 L.Ed.2d 320, 347 (1974).

[11] Federal Rules of Appellate Procedure for the U.S. Courts of Appeals, Rule 40.

[12] "Foreign Trade Policy, Compendium of Papers on United States Foreign Policy, Collected by the Staff for the Subcommittee on Foreign Trade Policy of the Committee on Ways and Means" (1958), pp. 643-648.

If even a statement by congressmen three years after passage would be poor authority, it is palpably improper to cite as legislative history a statement of a body in the executive branch which did not even have any authority over the matter.[13]

In regard to the reenactment of Section 1862(b) in the Trade Agreements Extension Act of 1958,[14] to ascribe probative value to the silence of Congress as to the statement of the ODM to a subcommittee of the House is even more farfetched than the argument from silence rejected by this Court in a criminal case in the last term. This Court stated,

> "In most circumstances silence is so ambiguous that it is of little probative force. . . . Failure to contest an assertion . . . is considered evidence only if it would have been natural under the circumstances to object to the assertion in question." *U. S.* v. *Hale*, —— U.S. ——, 45 L.Ed.2d 99, 104 (1975).

Clearly it would be unnatural to apply a rule of adoptive silence to every aberrant statement hidden in a report to congressional subcommittees.

Second, for the first time Petitioners cite the report in 1970 of the President's Task Force on Oil Import Control,[15] a subsequent proposal in Congress to amend Section 1862(b), and the proposal's deletion on the floor of the Senate, as premises yielding the conclusion that Congress acquiesced in the recommendation of the Task

[13] Under the statute in question, Section 1862(b), the role of the Office of Defense Mobilization was limited to investigating and informing the President when imports of an article were in quantities threatening the national security. The ODM had no mandate even to recommend to the President what action should be taken; clearly it had no authority to speak for Congress as to what actions were permitted.

[14] P.L. 85-686, 72 Stat. 673.

[15] *The Oil Import Question* (1970).

Force that the oil quotas be replaced with a system of tariff restrictions.[16] (Petition, p. 16) No such conclusion follows in logic and the essential additional premises are contradicted in fact. The Trade Expansion Act of 1962 was not reenacted in 1970, hence the Task Force Report represents an eight-years subsequent attempt to reconstrue the operative congressional intent — another example of nonprobative "subsequent legislative history" within the ruling in *Blanchette, supra.* The proposed amendment[17] to prohibit any adjustment of imports under Section 1862(b) through tariff modification was reported out of the Senate Committee on Finance as an amendment to the Social Security Act of 1970.[18] The amendment was deleted on a motion to recommit the entire Social Security bill to the Committee and clear the way for its passage by "stripping the Social Security Act of non-germane amendments." (116 Cong. Rec. 43625, 43645 (1970); remark of Senator Byrd at 43645). The deletion, hence, was a practical parliamentary move from which no inference should be permitted.

All in all, Petitioners have given no grounds for reviewing the statutory construction of the Court of Appeals and its careful analysis of the relevant legislative history.[19]

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[16] Three members of the Task Force opposed this recommendation so strongly that they wrote a minority report. The consequences of adopting the majority recommendation which the minority report predicted were well borne out in 1974 and 1975.

[17] H. R. Rep. No. 91-1435, 91st Cong., 2d Sess., 23 (1970).

[18] S. Rep. No. 91-1431, 91st Cong., 2d Sess., 36 (1970).

[19] Petitioners, it should be noted, take a position in fundamental disagreement with even the dissent in the Opinion of the Court of Appeals. Petitioners contend that the legislative history of Section 1862(b) "compels" the Government interpretation. (Petition, 12) The most that Circuit Judge Robb, dissenting, could say for the Government argument on this point was that "the legislative history of Section 232 [19 U.S.C. 1862(b)] is hopelessly ambiguous and inconclusive." (Petition, App., 31a)

III. The Petitioners Wholly Exclude From Their Discussion the Extensive Attention Given by the Court Below to Interpretive Considerations Other Than Legislative History.

Respondents respectfully submit that review by this Court on writ of certiorari is inappropriately requested where the decision of the Court of Appeals is dispositively governed by recent holdings of this Court. The Court below stated as one of the bases for its decision that "recent Supreme Court pronouncements mitigate against the expansive statutory construction advanced by the Government." (Petition, App. A, p. 12a)

Moreover, Respondents respectfully suggest that, for reason of time honored principles of interpretation relied upon by the Court below, it is unlikely that any court would accept the "expansive statutory construction" of Section 1862(b) for which Petitioners contend.

The statutory construction urged by Petitioners claims for the President implied powers of taxation which amount to a virtual abdication of the tariff power by the Congress. The expansive parameters of the President's implied powers of taxation as Petitioners construe Section 1862(b) are as follows: (a) By reason of the broad definition of "national security" in Section 1862(c), the President's power to "adjust imports" extends over virtually every article of commerce. (b) The President's asserted powers under Section 1862(b) include both the power to abolish completely congressionally established tariffs and to impose tariffs unlimited in amount — a claim of unbridled discretion without precedent in U.S. tariff legislation. (*See,* Proc. 4210, § 16; Proc. 4341, § 12). (c) The President's asserted powers include the power to impose a nonuniform tariff in contradiction of Article I, § 8, cl. 1 of the United States Constitution, through the unequal distribution of

fee-free oil allocations among the five geographical districts into which the States are divided. (*See,* Proc. 4210, § 15(b)-(e); Proc. 3279, § 2(a)) (d) The President's asserted power to impose tariffs would be essentially unreviewable by the judiciary since it involves a national security determination. (*C & S Airlines* v. *Waterman S.S. Corp.,* 333 U.S. 103 (1948); See also, *Sardino* v. *Fed. Res. Bank of N.Y.,* 361 F.2d 106 (2d Cir. 1966); *Werner* v. *U. S.,* 119 F. Supp. 894 (S.D. Cal., 1954)). (e) The President's exercise of these broad non-reviewable powers may not be rescinded by Congress — as recent experience indicates — except by overriding a Presidential veto by two-thirds vote of both Houses of Congress. The Court below could not accept that Congress, in authorizing the President to "adjust imports", intended to confer such unlimited, unprecedented and unreviewable executive powers.

The Court below found the Government's expansive construction of Section 1862(b) impermissible according to the reasoning of this Court in a case decided only last year — *National Cable Television Association, Inc.* v. *United States,* 415 U.S. 336 (1974). (*Accord, FPC* v. *New England Power Co.,* 415 U.S. 345 (1974)) In that case, this Court considered the validity of "runaway" license fees which exceed allocable administrative costs and the value to the recipient of the government services provided, and which thus invade the taxing power entrusted to Congress. The fees in that case were purportedly authorized by the Independent Offices Appropriation Act of 1952, 31 U.S.C. § 483a, in the provision for assessment of fees in consideration of "public policy or interest served." This Court distinguished between a tax, which may be imposed by Congress arbitrarily in consideration of public policy, and a fee, which "is incident to a voluntary act, e.g., a request that a public agency permit him [an applicant] to

practice law or medicine or construct a house or run a broadcast station" (*Id.,* at 340) and which properly exacts a charge for the benefit bestowed. The Court stated that the assessment of fees in consideration of public policy "carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriation Committee of the House." (*Id.,* at 341).

The Court below found the above reasoning of this Court dispositive of the present case:

> "We believe that this approach is dispositive, although the character of the 'fee' is different, of the claim of the legitimacy of charges imposed on imported petroleum under section 1862(b). We have already acknowledged that there could be an administrative 'fee' to cover the costs of administration. What we have here, however, is a regulatory charge, laid down by the Executive for policy reasons, carried far from the 'customary orbit' of a fee into broad domains of revenue. . . .
>
> "In sum, the President's expansive definition of a legitimate fee cannot be accepted. We must also conclude that the programs instituted by Presidents Nixon and Ford cannot be upheld as a proper license fee. To consider it as such would make a travesty of the term. It is, as the district court found, a 'regulatory measure' — an indirect control on imports — and thus outside the scope of section 1862(b)." (Petition, App. A, pp. 25a, 27a)

A fundamental rule of statutory construction is the rule reiterated by this Court in its last term:

> "[C]onstruction should go in the direction of constitutional policy . . . [W]hen one admissible construction will preserve a statute from unconstitutionality and another will condemn it, the former is

favored even if language, . . . and arguably the legislative history point somewhat more strongly in another way." (*Blanchette* v. *Connecticut General Insurance Corporations, supra,* at 348; citing *United States* v. *Johnson,* 323 U.S. 273, 276 (1944); and citing the court below, — F. Supp. — (1974))

An ancillary established principle of statutory construction is that statutes delegating the taxing power are to be narrowly construed. (Sutherland, *Statutory Construction,* § 66.05 (4th Ed., 1973)) Throughout our constitutional history the taxing power has been recognized as a dangerous instrumentality, the exercise of which must be carefully controlled. (*McCulloch* v. *Maryland,* 4 Wheat, 316 (1819).

It is important to note that no taxing power is mentioned at all in Section 1862(b). No rate of taxation is set forth, and no standard is present by which such a rate could be determined. The government in effect claims a spectrum of powers under Section 1862(b) which would have no reasonable limit, as long as such power would have an effect on imports. This claim could presumably encompass use of public funds as well as exercise of taxation powers. The government position is too far-flung and was rightly struck down by the decision below.

Respondents respectfully submit that the Petitioners' expansive construction of Section 1862(b) involves in the words of the Court below, "a massive assertion of executive authority in an area so thoroughly occupied by Congress [that it] requires careful scrutiny" (Petition, App. A, p. 14a), and that such a judicial scrutiny is dispositively resolved by rules of law reiterated in the decisions of the most recent term of this Court. Hence, no review is merited.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

HAROLD B. DONDIS
RICH, MAY & BILODEAU
One State Street
Boston, Massachusetts 02109
(617) 742-6550
WILLIAM R. CONNOLE
CONNOLE & O'CONNELL
One Farragut Square
Washington, D.C. 20006
(202) 347-8300

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